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No. 86-915

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ELSIE M. LEAR,
Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

BRIEF FOR THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

Did the Court of Appeals violate the prohibition of the United States Constitution against re-examining evidence because of the following allegations presented in the petition:

I. BECAUSE IT IGNORES MATERIAL AND SUBSTANTIAL EVIDENCE THAT ALL OF PLAINTiFF'S CHECKS WERE FIRST CONSIDERATIONS FOR SEPARATE SINGLE PREMIUM ANNUITY CONTRACTS ACTUALLY AUTHORIZED TO BE COLLECTED IN AGENT'S OWN NAME;

II. BECAUSE IT IGNORES THE CONTROLLING SUBSTANTANTIVE LAW OF MISSOURI REGARDING THE EFFECT OF COURSE OF CONDUCT IN ESTABLISHING IMPLIED OR ACTUAL AUTHORITY OF AN AGENT AND DISREGARDS THIS EVIDENCE SUPPORTING PLAINTIFF'S ACTUAL AUTHORITY THEORY OF RECOVERY;

III. BECAUSE IT IGNORES SUBSTANTIVE EVIDENCE SUPPORTING THE REASONABLENESS OF PLAINTIFF'S BELIEF, SUBSTITUTES ITS JUDGMENT FOR THAT OF THE JURY, APPLIES AN IMPROPER STANDARD OF REVIEW AND IGNORES THE CONTROLLING SUBSTANTIVE LAW OF MISSOURI REGARDING THE EFFECT AND SUFFICIENCY OF COURSE OF CONDUCT EVIDENCE IN DETERMINING THE REASONABLENESS OF BELIEF IN APPARENT AUTHORITY;

and,

did the Court of Appeals err by failing to consider that the District Court might have refused to instruct on the affirmative defense of the statute of limitations as a sanction for a failure to submit such an affirmative defense instruction in compliance with the District Court's pretrial order?

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vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY
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Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

BRIEF FOR THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES IN OPPOSITION TO PETITION

The respondent, The Equitable Life Assurance Society of the United States, submits its brief in opposition and respectfully prays this Court to deny the petition of Elsie M. Lear for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit for review of its judgment and opinion reversing a judgment in favor of said petitioner and remanding the case to the United States District Court, Eastern District of Missouri for retrial on limited issues.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in Appellate No. 85-1453EM is reported at 798 F.2d 1128 and is reproduced as Appendix A in the petition for a writ of certiorari by Elsie M. Lear (Pet. App. 1 thru 16). The judgment of the United States District Court, Eastern District of Missouri in Case No. N83-00039C entered upon a jury verdict is not reported, but is reproduced as Appendix C in said petition (Pet. App. 18).

STATEMENT OF JURISDICTION

The petition for writ of certiorari by Elsie M. Lear (the plaintiff in the District Court and the appellee in the Court of Appeals) was mailed for filing with the Clerk of the United States Supreme Court on December 2, 1986, following the denial by the United States Court of Appeals For the Eighth Circuit of her motion for rehearing in the Court of Appeals on September 4, 1986 (Pet. Appendix B, App. 17) after entry of the Court of Appeals' judgment and opinion filed on August 8, 1986 (Pet. App. 1). The United States Supreme Court has jurisdiction to review a final judgment under 28 U.S.C. section 1254(1) invoked by the petitioner if the petition is filed within ninety (90) days of the denial of the motion for rehearing under 28 U.S.C. section 2101(c) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. U.S.C.A. Const. Amend. 7

STATEMENT OF THE CASE

Petitioner's STATEMENT OF CASE is replete with misassertions of fact and argument with no reference to the record of this case and not supported by the record. A fair and succinct summary of the facts as presented to the United States Court of Appeals For the Eighth Circuit is set forth as the BACKGROUND in the Court of Appeals' opinion. (Pet. App. 2 thru 4).

Respondent's liability in this diversity case is premised solely on a theory of respondeat superior for the fraud of its agent in obtaining funds from the peitioner which the respondent never received. Said insurance agent received several checks from the petitioner and/or Mr. Lear made payable to the order of Denzil D. David (the agent) from on or about January 10, 1973 through September 6, 1975 in the amounts of $25,000.00, $21,000.00, $9,000.00, $25,000.00, $15,000.00, $15,000.00, $5,000.00, $6,500.00, and $3,500.00. (Pltf's Exh. 7,8A, 8B, 9, 10, 11, 12, 13A and 13B, Tr.Vol.II [Elsie Lear], pp. 21, 22, 31, 40, 42, 46, 48 and 51). In exchange for these checks, Denzil Daniel David gave the Lears documents entitled "Personal Notes" stating they obligated Mr. David to pay the Petitioner. (see footnote 3 of the Court of Appeals' opinion reproduced at Pet. App. 2 thru 3). None of these documents bear the respondent's name nor indicate that Denzil D. David signed them other than in his individual capacity. (Tr. Vol. II [Elsie Lear] pp. 68, 75, 77, 81, 85, 88 and 90).

Prior to commencing her action against the respondent, the petitioner pursued her claim against Mr. David and his wife, Letha R. David, on these "Personal Notes" (Tr. Vol. II [Elsie Lear] p. 102) to final judgment in Mr. David's bankruptcy case. (Pltf's Exh. 49, Tr. Vol. II [Elsie Lear] p. 122). She did not commence her action against the respondent until suit was filed in State Court on March 15, 1983. Thereafter, the respondent sought and obtained removal to the United States District Court, Eastern District of Missouri based solely on diversity

jurisdiction. The applicable statute of limitations is section 516.120(5) RSMo which requires a fraud action to be brought within five years of the discovery of the fraud or when it should have been discovered (unless diligence to discover the fraud is excused).

The jury was instructed by the District Court which read the following verdict director tendered by the petitioner:

> Now, in this case your verdict must be for the Plaintiff Elsie Lear if you believe the following:
>
> FIRST, Denzil Daniel David was acting within the scope and course of his agency for Defendant Equitable Life Assurance Society of the United States when he made the representations submitted in this instruction, and
>
> SECONID, Denzil Daniel David represented to Plaintiff Elsie Lear that the funds he received from her would be received on behalf of and invested with the Defendant Equitable Life Assurance Society of the United States in a retirement plan or annuity for Plaintiff Elsie Lear, intending that Plaintiff rely upon such representation in giving her funds to Denzil Daniel David, and
>
> THIRD, the representations were false, and
>
> FOURTH, Denzil Daniel David knew the representations were false and,
>
> FIFTH, the representations were material to the decision of Plaintiff Elsie Lear in giving her funds to Denzil Daniel David in the manner specified in the representations set forth in the previous paragraph second, and
>
> SIXTH, Plaintiff Elsie Lear relied on the representations in giving her funds to Denzil Daniel David and in so relying Plaintiff was using ordinary care, and
>
> SEVENTH, as a direct result of such representation, the Plaintiff Elsie Lear was damaged. (Instruction No. 5)

The jury was further instructed as to the substantive law that:

> If you believe the acts of Denzil Daniel David were within the scope and course of agency as just defined [i.e., in Instruction No. 6], your verdict must be for Defendant The Equitable Life Assurance Society of the United States unless you believe the acts of Denzil D. David were done to further the business of the Equitable Life Assurance Society of the United States. (Instruction No. 6a).

The agent's employment contracts with the respondent were in evidence at the trial of this case. (Pltf's Exh. 1). Petitioner also testified as to the transactions between her and the respondent's agent. On cross-examination she specifically testified that she received no communications from anyone on behalf of the respondent other than her discussions with Mr. David, nor did she receive any materials from the respondent directly and that she did not know of any Equitable representative who had any knowledge that Denzil Daniel David was executing these personal notes to the Lears. (Tr. Vol. II [Elsie Lear] pp. 99 thru 101).

Denzil Daniel David's employment contracts contained the following provision:

> XVI. Independent Contractor. Nothing contained herein shall be construed to create the relationship of employer and employee between The Equitable and the agent. The agent shall be free to exercise independent judgment as to the persons from whom applications for policies and annuity contracts will be solicitated and the time and place of solicitation. The Agent shall abide by the rules and regulations of the Equitable in accordance with Paragraph VII hereof but such rules and regulations shall not be construed so as to interfere with the freedom of action of the Agent as described in this Paragraph. (Plft's Exh. 1)

Based on the agent's employment contracts in evidence the Court of Appeals held as a matter of law that Denzil Daniel

David had no express or actual authority for the payment of monies to Mr. David, except for the first premium check dated January 10, 1973 for $25,000.00. (see Opinion at Pet. App. 6). The Court of Appeals expressly considered the law and the evidence of "prior courses of dealings and similar transactions" as creating apparent authority for the agent to collect all premium checks. (see Opinion at Pet. App. 7). The Court of Appeals concluded:

> We appreciate the fact that the Lears were elderly and in somewhat poor health at the time of these transactions. However, the totality of the evidence, especially the personal notes, leads us to hold that an ordinarily reasonable and prudent person could not reasonably have believed that David had the apparent authority to collect the later premium checks.
>
> Again, while we are mindful that it is for the jury and not us to evaluate and weigh the evidence, an examination of the record as a whole simply does not disclose the evidence of substance which is needed to support this jury verdict.
> (see Opinion at Pet. App. 8).

The record discloses no mention of any sanctions considered or imposed by the District Court upon the respondent for any failure to comply with the pretrial orders regarding submitting jury instructions. The record before the Court of Appeals was that the respondent (which did plead the affirmative defense of the statute of limitations) did not request a specific written instruction on this defense, but did object that this issue should be placed in the verdict director. (see Opinion at Pet. App. 9).

The Court of Appeals observed that the facts were unclear as to when Lear first discovered the fraud, and that there was evidence in support of the defense and that the District Court prejudicially erred in not submitting an instruction on this issue to the jury.

The Court of Appeals held that the respondent could not be liable for more than damages flowing from the first representation, and therefore remanded the case for a determination of any actual and punitive damages from this representation plus for a fact determination whether the statute of limitations was satisfied.

Given this disposition of the petitioner's appeal, the Court of Appeals noted further discussion of whether the evidence was sufficient to prove damages was unnecessary. (footnote 9, Opinion, Pet. App. 8). Mrs. Lear had testified at the trial as to her damages that she did receive some payments of monies from Denzil D. David on various of Plaintiff's exhibits [the "Personal Notes"], but did not have records or any way of knowing how much or if all of such payments had been received. (Tr. Vol. II [Elsie Lear] pp. 71, 77, 78, 79, 82, 83, 85, 86, 88, 89, 91, 92, and 41).

This case is pending retrial on the issues of the statute of limitations and of damages pursuant to the mandate of the United States Court of Appeals For the Eighth Circuit, following its denial of the petitioner's petition for rehearing. (Resp. Brf., App. 1, et seq.)

ARGUMENT

The petition for writ of certiorari to the United States Court of Appeals For the Eighth presents no special and important question justifying further review of the evidence in this case by the Supreme Court of the United States, and raises for the first time an assertion by the petitioner that her Seventh Amendment right to not have a court reexamine any fact tried by a jury, otherwise than according to the rules of the common law was violated. (see PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT THEREOF BY APPELLEE, ELSIE M. LEAR, (Resp. Brf., App. 1, et seq.)

Among the many reasons why the petition for a writ of certiorari to the United States Court of Appeals For the Eighth Circuit should be denied, the following are compelling:

1. It is within the review jurisdiction of the Court of Appeals to determine as a matter of law whether the evidence is sufficient to support a jury verdict without violating the Seventh Amendment to the United States Constitution;

Petitioner argues the same abstract principle of law set forth in *Smith v. Honeywell, Inc.*, 735 F.2d 1067, 1069 (8th Cir.), cert. denied, 105 S.Ct. 576 (1984) followed by the Court of Appeals in its opinion (Pet. App. 5 and 8) that it could reverse a jury verdict when no evidence of substance supports it. This standard of review is consistantly applied in the Court of Appeals For the Eighth Circuit. e.g. *Ybarra v. Burlington Northern Inc.*, 689 F.2d 147, 150 (8th Cir. 1982).

The Seventh Amendment "was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details." *Galloway v. United States,* 319 U.S. 372, 392, 63 S.Ct. 1077, 1088, 87 L.Ed. 1458 (1943). It is held that at the core of these fundamental elements is the right to have a "jury ultimately determine the issues of fact if they cannot be ... *determined as a matter of law.*

"*Woods v. Holy Cross Hospital,* 591 F.2d 1164, 1178 (5th Cir. 1979). See also *Ex Parte Peterson,* 253 U.S. 300, 310, 40 S.Ct. 543, 546, 64 L.Ed. 919 (1920).

It clearly appears that the Court of Appeals could determine that the issues of fact it reversed were erroneous as a matter of law under the standard of review it followed without violating the petitioner's Seventh Amendment rights, and in so holding has not departed from the usual and accepted course of judicial proceedings requiring further review by the United States Supreme Court.

2. No federal law questions are involved in this purely diversity jurisdiction case;

Petitioner has merely reargued to this Court that substantive evidence supported the jury verdict, and that the Court of Appeals ignored controlling substantive law of Missouri regarding the effect of course of conduct evidence. Contrary to this assertion by the petitioner, the Court of Appeals specifically considered this law, citing *Jefferson-Gravois Bank v. Cunningham,* 674 S.W.2d 561 (Mo.App. 1984) at 563-64, and *Houston v. Groth Enterprises, Inc.,* 670 S.W.2d 178 (Mo.App. 1984) at 180. (Opinion, Pet. App. 6 thru 7). Thus, the petition presents no reason for certiorari to be allowed of the character indicated in Supreme Court Rule 17.

3. Petitioner has waived any constitutional rights violation by not asserting her rights under the Seventh Amendment in her petition for renearing in the Court of Appeals;

Petitioner's petition is premised upon a constitutional error by the Court of Appeals, and not by any constitution question presented in her case against the respondent. Her vehicle for bringing the Seventh Amendment issue to the attention of the Court of Appeals was a petition for rehearing under F.R.A.P. 40. However, in her petition for rehearing she argued that substantive evidence supported the existence of apparent

authority, but no where asserted any violation of the Seventh Amendment of the United States Constitution. (Rsp. Brf., App. 7 thru 13)

Since the petitioner's constitutional contentions were not presented to the Court of Appeals, they are waived and are not properly presented to this Court. *Rogers v. Lodge,* 458 U.S. 613, 629, n.2, 102 S.Ct. 3272, 3281, n.2, 73 L.Ed.2d 1012 (1982).

> 4. Further review of this case is premature as all other issues may become moot upon a jury determination on the statute of limitations issues and the damages issues;

Multiple and complex issues were and still are presented by the facts of this case. However, the judgment and mandate of the Court of Appeals has reduced these on remand for retrial to all of the damages issues and the statute of limitations issues, including whether the petitioner suffered any damages from the first representations, when she discovered the agent's fraud and which rule of discovery (due diligence to discover vs. such diligence being excused because of a fiduciary relationship) applies under section 516.120(5) RSMo. Until the retrial of these issues is completed, this case is not appropriately ripe for further review and the questions presented by the petition for certiorari may become moot.

> 5. Federal Courts do not create state law and the Court of Appeals' opinion is not binding upon state courts or non-parties so that this case is of limited precedential value.

In the case of *Futrell v. State,* 667 S.W.2d 404 (Mo. banc 1984) the Missouri Supreme Court reaffirmed that "While unquestionably meriting respect, rulings of the Eighth Circuit Court of Appeals are not generally binding on Missouri state court, [citations deleted], and the trial court's evaluation would be independent of [the Eighth Circuit case]. Id. at 407. Likewise, the opinion of the Eighth Circuit Court of Appeals in

this case has no res judicata effects upon any non-parties to this case. Thus, the problem, if any, in this case is peculiar to these parties and the Seventh Amendment issue presented by the petitioner is merely "academic and episodic" so that certiorari is inappropriate in The United States Supreme Court. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed 897 (1955).

> 6. Senior Circuit Judge J. Smith Henley penned the opinion (joined by Circuit Judges Theodore McMillian and John R. Gibson,) and in the opinion was expressly mindful of the applicable standard for reversing a jury verdict which was followed;

The panel of judges in this case for the Court of Appeals, and the Eighth Circuit generally, does not frequently reverse jury verdicts. However, if appellate review is to be meaningful such action must be available and taken when the lack of sufficient evidence requires it under the appropriate standard of review. The petition does not take issue with the standard of review applied by this panel of judges, but simply disagrees with its determination using this standard. Unless the United States Supreme Court chooses to function as an ordinary appellate court in this case, there is no reason presented to simply review the evidence as sought by the petitioner. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951).

> 7. This case involves no unsettled principles of law or conflicts between any courts regarding the right of the Court of appeals to reverse an erroneous jury case, and its outcome is only of importance to the parties so that ordinary appellate review rather than certiorari in the United States Supreme Court is appropriate;

As stated above this case is of limited precedential value and deals primarily with the application of proper standards of review of a jury verdict to the peculiar facts of this case. Thus, the outcome of this case is important to these parties, but is of

little importance to the public in general. As this Court has stated in the past, it is important for this Court to consistently deny the writ of certiorari except in cases involving matters of importance to the public as distinguished from the parties. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-393, 43 S.Ct. 422, 423-424, 67 L.Ed 712 (1923).

> 8. The judgment of the Court of Appeals is fair and equitable to the petitioner, and if any error was made it was in holding the respondent liable for any damages caused by the agent's representations as the fraud of the agent was solely for his own benefit;

The petitioner is entitled to a new trial under the mandate of the Court of Appeals with a new opportunity to prove her damages. The Court of Appeals did not resolve whether she had presented sufficient evidence of actual damages to make a submissible case for fraud, although her own testimony revealed no basis for determining if and how much money the agent had not paid her as called for in his "Personal Notes" and she was the party in a position to know that fact since the respondent did not receive the money or pay her any money in these transactions between the petitioner and the respondent's agent.

Further, the evidence and basis of the petitioner's claim against the respondent was that the agent committed the fraud for his own benefit and not the respondent's. The Court of Appeals apparently rejected the respondents arguments as to the effect of the evidence, however its discussion focused on the issues of "scope and authority" of respondent's agent without making any express holding or discussion of the sufficiency of the evidence to support a jury verdict against the respondent under Instruction No. 6a. This instruction was in addition to the fact that the petitioner submitted her case by paragraphs SECOND and THIRD of Instruction No. 5 on a theory requiring the jury to find that the agent's representations that her funds "would be *received on behalf of* and invested with" the respondent were false, although the respondent's vicarious liability is

dependent upon the agent having received her funds within the course and scope of his authority for the benefit of the respondent.

> 9. Petitioner has skewed the facts, argued law not supporting her positions, and has failed to present with accuracy, brevity and clearness that which is essential to a ready and adequate understanding the points, if any, requiring consideration;

Petitioner presents as a question for the extraordinary grant of a writ of certiorari whether the Court of Appeals abused its discretion in not considering that the District Court did not instruct on the statute of limitations as a sanction for her bold assertion that the respondent disobeyed the pretrial order. This point calls for pure speculation as she even admits in her petition that respondent's objection to the verdict director as not requiring a finding on this pleaded affirmative defense "was overruled by the District Court without further comment". (Pet. p. 22). Case law in Missouri provides in circumstances such as in this case where the fraud occurs more than five years prior to commencement of the action it is the plaintiff who then has the burden of proof on the issues of the statute of limitations which she must plead and prove, unless waived by the defendant's failure to plead this defense. *Kueneke v. Jeggle,* 658 S.W.2d 516 (Mo.App. 1983), *Burr v. National Life and Accident Insurance Co.,* 667 S.W.2d 5 (Mo.App. 1984), *Harding v. Modern Income Life Insurance,* 593 S.W.2d 568 (Mo.App. 1979), *Alexander v. Perkin Elmer Corp.,* 729 F.2d 576 (8th Cir. 1984).

Petitioner likewise asserts as fact in her STATEMENT OF CASE that she actually discovered the fraud in 1980 (Pet. p. 5) whereas this remains an open fact issue.

Further, cases cited by the petitioner in her petition do not support her arguments. e.g. the case of *Jefferson-Gravois Bank v. Cunningham,* 674 S.W.2d 561 (Mo. App. 1984) is not

substantive law of Missouri "that *actual* authority of an agent may be predicated upon a course of conduct..." (Pet. 11). Rather, this case is correctly cited by the Court of Appeals as authority that *apparent* authority may be shown by prior courses of dealings. (Opinion, Pet. App. 7.). This erroneous legal argument and premise is repeated in the questions presented by the petitioner as the reason The Supreme Court of the United States should grant certiorari.

Such errors in the petition for a writ of certiorari exemplify the failure of the petitioner to be accurate, brief, and clear and alone are sufficient reasons for denying her petition under Supreme Court Rule 21.5.

CONCLUSION

Petitioner presents no question for review by writ of certiorari to the United States Circuit Court For the Eighth Circuit that justifies the exercise of the discretionary power of the Supreme Court of the United States to grant her petition.

Supreme Court Rule 17 provides that such review will be granted only when there are special and important reasons therefor, and provides examples indicating the character of reasons that will be considered. No such reason is asserted by the petitioner in this case. Rather, the petitioner merely seeks a redetermination of the sufficiency of the evidence and inferences which the Court of Appeals in the usual course of appellate review has determined against her.

The standard of review for reversing the judgment of the trial court upon the jury verdict in this case is undeniably consistent with the petitioner's right not to have a court of the United States reexamine facts determined by the jury otherwise than allowed by the common law. Further, under the judgment and mandate of the Court of Appeals the petitioner may still have a jury determination of her recoverable damages making such review premature and potentially moot.

The judgment and opinion of the Court of Appeals is the law of this case for the mandated retrial, but as a precedent does not effect the substantive law of Missouri nor the appropriate standards for review of jury verdicts under the Seventh Amendment of the United States Constitution or general principles of law.

Finally, the petitioner relies on a constitutional right first asserted in her petition for writ of certiorari, relies on case law unsupportive of her assertions, is argumentative and misstates facts in her STATEMENT OF CASE, and fails to adequately present what is essential to a ready understanding of the questions presented with accuracy, brevity and clearness.

Therefore, this Court should be consistent and not grant the writ of certiorari to the United States Court of Appeals For the Eighth Circuit sought by the petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 85-1453EM

Elsie M. Lear,
Appellee,

vs.

The Equitable Life Assurance Society
of the United States,
Appellant.

PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT THEREOF

Comes now the Appellee and requests this Court pursuant to Rule 40 of the Federal Rules of Appellate Procedure and Rule 15 of this Circuit's local rules to rehear and reconsider its judgment entered August 8, 1986, and in support thereof states that said judgment has overlooked material facts or misconstrued the law as relates thereto in the following respects, to-wit:

1. All checks paid by Lear to David and forming the basis for this action were, in each instance, first (and only) premium checks for single premium annuities and were, therefore, within the express authority of said agent.

The jury found all elements of the verdict director, including that Agent David was acting within the scope and course of his agency under either the actual or apparent authority submissions and reasonable reliance by Lear on David's misrepresentations. Thus, the question is whether there was evidence of substance viewed in a light most favorable to the verdict and giving Lear the benefit of all reasonable inferences to support the jury's determination of actual authority with respect to *all* checks forming the basis of this suit. *Smith v. Honeywell, Inc.*,

735 F.2d 1067, 1069 (8th Cir.) *Cert. Denied* 105 S.Ct. 576 (1984); *Northern v. McGraw Edison,* 542 F.2d 1336 (5th Cir. 1976). There was such evidence of substance in the form of Lear's unrefuted testimony that *all* checks were first (and only) payments for single premium annuities (See Vol. II within Vol. I (filed 4/15/85) - partial transcript P. 15, L. 25; P. 16, L. 1-3; P. 17, L. 6-9; P. 20, L. 5-16; P. 23, L. 4-12; P. 32, L. 7-10; P. 38, L. 3-9, 17-19; P. 40, L. 20-24; P. 42, L. 5-10, 22-25; P. 46, L. 2-6, 12-17; P. 52, L. 17-19; P. 127, L. 12-19; P. 129, L. 5-13), the reason this type annuity was necessary (Vol. II within Vol. I (filed 4/15/85), P. 20, L. 5-16), the Defendant's document confirming Lear's recollection of cancellation of a monthly payment annuity (D's Exh. F-1 and Pl's Exh. 29), the Defendant's contract with David allowing collection of first premiums (Pl's Exh. 1) and David's stipulation that he defrauded Lear by falsely representing her funds would be forwarded to Defendant to purchase single premium annuities (Pl's Exh. 49). Consequently, each and every check which is the subject of this suit was expressly authorized by Defendant to be collected by David by the express provisions of their employment contract. (Pl's Exh. #1) Therefore, analysis of these checks focusing upon whether the same are first or subsequent checks fails to properly consider that David was actually authorized to accept all first premium annuity payments in his own name and that all Lear's checks were first (and only) premium payments for single premium annuities. It is of no consequence that the purchases after the first were through the same agent and with the same company. They were still first premiums expressly authorized by David's contract to be collected and by practice and custom impliedly authorized to be collected in his own name. Further, analysis focusing on the effect of the notes and David's payments is inappropriate because the jury passed on whether these were "notes" and found they weren't solely agent's responsibility as would be true with notes. (See D's closing argument - Vol. III, P. 41, L. 18-20) Rather, the jury was entitled to consider oral evidence in variance with the terms of the "notes" in support of the plea of fraud to explain the transaction, did consider the

same and found Lear's evidence persuasive. Thus, any argument regarding notice to Lear by the "notes" or checks drawn on David's personal account is simply not in point since these acts constitute part of the effort to prevent detection of the fraud, do not bear at all on whether David was actually authorized to receive Lear's funds for remittance to Defendant, and was determined by the jury in favor of Lear in passing upon the reasonableness of her reliance on David's representations. *Bowers v. S.H.S. Motor Sales,* 481 SW2d 584 (Mo. App. 1972) Moreover, reasonableness of reliance is not even an issue where, as here, there is a fiduciary relationship or the fraudfeasor has superior knowledge of the facts, *Tietjens v. General Motors Corp.*, 418 SW2d 75 (Mo. Supp. 1967); *Vinyard v. Herman,* 578 SW2d 938 (Mo. App. 1979), or where, as here, the fraudfeasor makes a positive representation inducing Plaintiff not to make inquiry into the true facts, *Bowers v. S.H.S. Motors Sales, Supra,* and is never an element of the definition of actual authority. (Instruction #6) It is important to recognize that while the fraud continued from one check to the next in terms of preventing detection, each check given was a new fraud completed when David received Lear's respective checks, each of which was expressly authorized by Defendant to be collected by David from Lear in his own name. Moreover, even if these checks were not payments for single premium annuities, the same result obtains since Lear is not bound by secret limitations on David's authority. *Wynn v. McMahon Ford,* 414 SW2d 330 (Mo. App. 1967).

Finally, the concept of implied authority recognizes that the actual or express authority of an agent can be enlarged upon by a course of dealing accepted or acquiesed in by the principal. *Jefferson-Gravois Bank v. Cunningham,* 674 SW2d 561 (Mo. Ct. App. 1984). This principle is recognized in paragraph 2 of the actual authority definition given by the Court. (Instruction No. 6) In this connection, not only did Lear pay directly to David pursuant to his promise that the funds would be remitted to Defendant but, also, the evidence established that this prac-

tice was permitted by Defendant's contract with David (Pl's Exh. 1) and he had a habit of collecting all premium checks, not just the first, in his own name (Pl's Exhs. 27a - 27gg) despite express provisions in his employment contract to the contrary. (Tr. Vol. I (filed 4/15/85), P. 18, L. 17-25; P. 19, L.1) (See also Tr. Vol. I, P. 41, L. 6-10) Moreover, Defendant permitted this to continue for a period of several years, before, during and after the fraud perpetrated upon Lear. (Tr. Vol. II, P. 47, L. 15-17, L. 20-22, 25; P. 48, L. 1-5, 8-12) Furthermore, it is a common practice in the industry for premium checks to be made payable to the agent and not the company. (Tr. Vol. II, P. 41, L. 15-19; P. 43, L. 23-25; P. 44, L. 3) This fact has even been recognized by the Missouri Supreme Court in *Glynn v. M.F.A. Mutual Ins. Co.*, 254 SW2d 623 (Mo. Sup. En Banc 1953) where the Court said "It was his duty to make collections ...". Thus, the actual authority of David as expressed in the contract, as implied by prior dealings between him and Defendant and as implied by custom in the industry generally, clearly indicates that the receipt by David in his own name of *all* of the checks which are the subject of this suit was an act within his actual authority whether express or implied. Certainly the jury had ample evidence before it to find that the receipt of Lear's funds by David was within his actual authority whether express or implied. This holding renders unnecessary a consideration of apparent authority and avoids the judicial and societal problems arising from this Court's present holding that an agent, as a matter of law, is not apparently authorized to transact the exact business he is expressly authorized to conduct. Stated alternatively, an exceedingly dangerous precedent that a Plaintiff is not, as a matter of law, reasonable in relying upon appearances of authority to act as expressly authorized by said agent's contract, accepted as common practice in the industry, permitted and acquiesed in by said agent's principal and generally accepted by the bulk of society... not to mention this jury, is avoided.

2. The evidence was unrefuted and Defendant admits that as a part of David's duties he was in a fiduciary relationship with Lear which established this fact as a matter of law.

The evidence at trial was unrefuted that David, as a part of the duties of his employment with Defendant, was in a fiduciary relationship with Lear. An agent of Defendant, Robert O. Parker testified that it is a duty of an insurance agent to invite and obtain the trust and confidence of prospective clients if any insurance is to be sold. Tr. Vol. I (filed 4/15/85), P. 6, L. 24, 25; P. 7, L. 6-9, 18-20, 25; P. 8, L. 1-3. Lear testified that she was invited by David to repose her trust and confidence in him and did repose such trust and confidence in him with respect to *each* of the checks intended as payment for single premium annuities. See Vol. II within Vol. I - partial transcript (filed 4/15/85) P. 14, L. 19-21; P. 15, L. 18-20; P. 17, L. 17-25; P. 18, L. 1-3, 12-14; P. 21, L. 8-11, 15, 16, 20-22; P. 22, L. 14-25; P. 23, L. 13-20; P. 27, L. 3-7; P. 33, L. 15-25; P. 34, L. 1-12, 20-22; P. 35, L. 21, 22; P. 36, L. 22-25; P. 38, L. 10-13, 17-21; P. 40, L. 20-25; P. 41, L. 1-6; P. 42, L. 24, 25; P. 43, L. 1-6; P. 44, L. 20-22; P. 46, L. 14-20; P. 47, L. 9-13; P. 50, L. 9-15; P. 52, L. 10-13; P. 74, L. 20-22; P. 127, L. 20-25; P. 128, L. 1, 2, 6-9. Indeed, there can be no question but that when we deliver our funds to an insurance agent for remittance to the insurance carrier we are reposing trust and confidence in said agent that said funds will be so remitted. The definition of a fiduciary clearly demonstrates this fact when said term is defined as "a person holding the character of a trustee ...; one is said to receive money ... in a fiduciary capacity when ... the money ... he handles is not his own ..." *Black's Law Dictionary,* (4th Ed. Rev. 1968).

Finally, Defendant alleges in point "C" of its brief on appeal that David was also the agent of Lear. (See Point "C" of Appellant's Brief on Appeal). Said allegation on appeal constitutes a judicial admission by Defendant that David stood in a fiduciary relationship with Lear. While Lear does not concede

that David was her agent, there can be no question but that David was acting in a fiduciary capacity with respect to the remittance of Lear's funds to Defendant.

Since there was absolutely no factual dispute regarding this fiduciary relationship, this issue is established as a matter of law without the need to instruct the jury on the same since matters about which there can be no dispute need not be submitted to the jury. *Bowers v. S.H.S. Motor Sales, Supra; Vinyard v. Herman, Supra; Shechter v. Brewer,* 344 SW2d 784 (Mo. App. 1961).

3. Substantial evidence supports the jury's determination of the existence of apparent authority by David to receive Lear's funds for remittance to Defendant.

It has been variously stated that a jury verdict will only be overturned when, viewing the evidence in a light most favorable to the verdict and giving the prevailing party the benefit of all reasonable inferences and resolving all conflicts in said party's favor, no evidence of substance supports it. *Smith v. Honeywell, Inc., Supra; Northern v. McGraw-Edison, Supra.* As Lear has already submitted sufficient evidence and arguments to support a determination of the existence of actual authority on the part of David to receive all her funds and remit each said collection to Defendant for the purchase of single premium annuities as was expressly conferred in said agent's contract with Defendant, those arguments will not be here repeated. However, it bears repeating that each check given by Lear to David and upon which this suit is based was for the purchase of a single (and only) premium annuity as was specifically authorized by Defendant's contract with David. Consequently, analysis of the reasonableness of Lear's reliance on appearances that David had the authority to receive her checks and remit the same to Defendant for the purchase of single premium annuities must focus upon the appearance to do just that. Moreover, by virtue of the fiduciary relation, Lear's reliance on appearances to create the apparent authority of Agent David to remit her

funds from each of her checks for the purchase of single premium annuities is to be viewed not only in a light most favorable to the jury's verdict and giving Lear the benefit of all reasonable inferences, but, also, without any need or necessity on Lear's part to inquire behind the appearances creating such authority. *Tietjens v. General Motors Corp., Supra; Bowers v. S.H.S. Motor Sales, Supra; Shechter v. Brewer, Supra;* Remember, in this context, that the only authority which Lear need reasonably have believed (based upon appearances) David had, is the same authority which the contract expressly conferred, prior dealings between said agent and Defendant impliedly authorized and custom and practice in the industry readily recognizes. Analysis focusing upon the "personal notes" is inappropriate since the jury was permitted, under an exception to the parole evidence rule, to hear Lear's testimony in variance with the express language with these documents and the jury was entitled to believe and, indeed, did believe that these were not "notes" at all but were, as testified by Lear, receipts for funds delivered and an indication of the amounts she was to receive with respect to each investment. (See D's closing argument - Vol. III, P. 41, L. 18-20) The jury was certainly entitled to believe that these documents and the payments David made to Lear were a part of the effort of David to conceal his fraud and were, certainly, not a part of the transaction which was completed upon delivery of the respective checks to David. To hold to the contrary disregards well established precedent in the State of Missouri regarding what a jury may believe with respect to the reasonableness of a Plaintiff's reliance on apparent authority. Specifically, *Bowers v. S.H.S. Motor Sales, Supra,* held that even though the contract between the agent and plaintiff indicated that the car being purchased was used, said plaintiff was entitled to rely upon the agent's representation that said vehicle was new. Further, *Wynn v. McMahon Ford, Supra,* held that a "car order form" was not, as the document stated, an offer to purchase by plaintiff but was, rather, a receipt for down payment. Further, *Baker v. St. Paul Fire and Marine Ins.*

Co., 427 SW2d 281 (Mo. App. 1968), held that a plaintiff may rely upon the appearance of authority and all representations of the agent within the scope of said apparent authority even though in direct contradiction of express limitations on said agent's authority. Finally, *Tietjens v. GMC, Supra,* held that an application form which specifically and prominently displayed the limits of the agent's authority was not controlling. Rather, the plaintiff was entitled to rely upon the appearance of authority and the jury entitled to believe that said reliance was reasonable. Indeed, even if these checks were not payments for single premium annuities, Lear's reliance on the appearance of authority in David to collect the same for remittance would still be reasonable since secret limitations on David's authority are not binding on her. *Wynn v. McMahon Ford, Supra.*

The facts which support the reasonableness of Lear's reliance on the appearance of authority in David to receive her funds and remit the same to Defendant for the purchase of a single premium annuity are many and various. Specifically, the fact David was provided with a business card, pamphlets and brochures, office space, secretarial services, a telephone listing and other indicia of his employment by Defendant; the employment contract between Defendant and David specifically authorizing the receipt by him of funds for remittance to Defendant; the course of conduct between Defendant and David indicating that Defendant had authorized him to collect said funds in his own name and remit them through his personal checking account to the Defendant; Defendant permitting this collection and remittance with respect to not only the first premiums but also subsequent premiums; the well established custom in the insurance industry for agents to collect premiums in their own name for remittance to their principal; the fact the first attempt by Lear to purchase an annuity with Defendant was accomplished by signing a check payable to David but intended for remittance to Defendant; and the powers associated with the position David held all indicate his apparent authority. *Shechter v. Brewer, Supra; Tietjens v. General Motors Corp.*,

Supra. While apparent authority cannot be based solely on the declarations of an agent, the statements of David can be utilized to help explain the reasonableness of Lear's reliance on his apparent authority. Therefore, the first annuity which was withdrawn or cancelled was applied for without the Lears signing any application and establishes a course of conduct from prior dealings upon which Lear reasonably may rely in believing that David had the authority to fill out documents on her behalf in applying for annuities. Since Defendant's own exhibits and records show that this application was received by Defendant (See D's Exh. F-1, P's Exh. 29), it cannot be questioned that application could be made in this fashion. Therefore, David was apparently authorized to represent to clients that he could fill out their applications for annuities for them. The Court should also bear in mind that it was David's positive misrepresentations and attempt to conceal this fraud which kept Lear off-guard and prevented inquiry. Further, the position which an agent enjoys gives rise to certain powers and authority even if said authority is expressly withheld by the principal. *Wynn v. McMahon Ford, Supra.* Consequently, since David was expressly authorized to collect first premiums (which all checks of Lear were), David's apparent authority to collect the same for remittance to Defendant should not be questioned in the face of a jury verdict that said agent had said authority.

Finally, the precedent established by the Court's present holding is exceedingly dangerous to society since Lear's offer of proof amply demonstrated that twenty-three (23) other elderly individuals were defrauded by David in essentially the same fashion. (See Pl's offer of proof - Tr. Vol. I (filed 5/13/85) P. 67, L. 1 through P. 83, L. 5; Tr. Vol. II (filed 5/13/85) P. 2, L. 10 through P. 6, L. 4) Consequently, it cannot be questioned that the bulk of society considers themselves reasonable in giving their agents premium checks made payable to the agent with the trust that the same will be forwarded to the insurance carrier. In this connection, what was said in *Darks v. Grocer Co.*, 146 Mo. App. 246 (1910), is equally applicable here. Specifical-

ly, the Court stated that the liability of the principal for his agent's tort is not based upon a presumed authority in the agent to do the acts but upon public policy for the reason that it is more reasonable when one of two innocent persons must suffer from the wrongful act of a third person that the principal who has placed the agent in the position of trust and confidence should suffer than a stranger. While this principle has been variously stated to involve imputing knowledge by the agent of his own fraud to the principal as in *Globe Indemnity Co. v. First National Bank, St. Louis,* 133 SW2d 1066 (1939), the controlling principal underlying all of these cases is that stated in *Southern Pac. Trans. Co. v. Continental Shippers,* 485 F. Sup. 1313 D.C. (Mo. 1980), that as between a principal and a third party, the principal must bear the risk when his agent fails to properly perform his duties.

In conclusion, it is apparent that this Court is not viewing the evidence in a light most favorable to the verdict, giving Lear the benefit of all reasonable inferences nor resolving conflicts in the evidence in favor of Lear when the Court reviewed the "totality of the evidence" and focuses on the "personal notes" despite the jury's determination to the contrary. This analysis disregards the fact that the jury was certainly entitled to believe that these were not "personal notes" at all and, further, disregards the fact that these "notes" have nothing to do with the apparent authority of this agent to receive Lear's funds and forward the same to Defendant for the purchase of single premium annuities. The jury was entitled to believe that these "notes" and the payments made by David were simply a method to prevent detection of his fraud. Analysis should focus upon the fact that once a defrauded party gives his money to an agent under the circumstances of this case, subsequent transactions are made easier, not more difficult, particularly in light of the fact that payments were being received as had been represented. Lear is not arguing that the statements of David create his apparent authority. Rather, the initial annuity application which was withdrawn clearly evidences a course of

dealing upon which Lear was entitled to rely. Thus, the fiduciary nature of the relationship between David and Plaintiff, the superior knowledge by David of the facts, the affirmative misrepresentation calculated to and having the effect of inducing Lear's reliance, the efforts on the part of David to prevent discovery of his fraud, the normal authority of the position David enjoyed as an agent of Defendant, the indicia of apparent authority manifested in the form of office space, pamphlets and brochures, business cards, phone listings and secretarial services, the well-accepted standard in the industry and by society in general of having agents collect premiums and the prior course of dealings in the form of the first withdrawn annuity application all constitute substantial evidence in support of the jury's determination of apparent authority. It appears this Court has overlooked the fact that all checks were given for the purchase of single premium annuities and were, thus, actually authorized. Further, the jury found Lear's reliance on David's representation that he would send her funds to Defendant was reasonable and this Court has acknowledged that David had the actual authority to make said representation with respect to, at least, the first check collected. Consequently, how then can it be unreasonable as a matter of law for her to rely on the apparent authority of the same agent to perform that same duty with respect to subsequent checks given in payment for single premium annuities. To do so reduces to the proposition that David was not apparently authorized to do what he was actually authorized to do.

4. Defendant is not entitled to an instruction on the affirmative defense of the statute of limitations because it did not tender one in obedience to the Pretrial Order and because the evidence clearly established that Lear neither knew nor should have known she was being defrauded until after March 15, 1978, within five (5) years of the filing of this action.

In this case, the trial Court's pretrial order pursuant to Rule 13, Form A (*Rules, U.S. Dist. Ct., E. D. Mo.* as amended), pro-

vided that, "the attorneys shall, not less than ten days prior to the date set for trial ...(4) submit to the Court and to opposing counsel their written requests for instructions, reserving the right to submit requests for additional or modified instructions not more than three days thereafter in light of the instructions not more than three days thereafter in light of the opposing party's requests for instructions," and that "...except for good cause shown, no party shall be permitted ... to submit requests for any further or additional instructions for consideration by the Court." Defendant submitted no request for an instruction on the affirmative defense of the statute of limitations in compliance with this pretrial order. (See Defendant's compliance with pretrial order) Consequently, the Court was free to apply sanctions "including, but not limited to, dismissal of the action, entry of a default judgment, or restrictions on the admissibility of certain evidence, as described in the order". *Rule 13, Supra.* The Court chose to consider the affirmative defense of the statute of limitations to be waived by the Defendant's failure to tender an instruction on this defense in compliance with the pretrial order and, therefore, refused to instruct on this issue. That is an appropriate sanction under Rule 13 since it deals explicitly with the Defendant's failure to tender an instruction on said issue and clearly eliminates this point on appeal even though Defendant might otherwise have preserved this point for appeal by objecting to Plaintiff's verdict director.

Alternatively, the trial Court held, as a matter of law, that there was no need to instruct the jury on this defense because the uncontradicted evidence established a fiduciary relation between David and Lear thus eliminating the need to instruct the jury on that question and making the point at which Lear actually knew she had been defrauded the only relevant point in time for the period of limitations. *Burr v. National Life & Accident Ins. Co.*, 667 SW2d 5 (Mo. App. 1984) In this connection, the Defendant's own evidence established regular monthly payments to and after March 15, 1978. (See D's Exh. K-6) Moreover, Lear's evidence established that she did not actually

know she had been defrauded until after December, 1980, when her husband died. (Tr. Vol. II within Vol. I (filed 4/15/85) P. 57, L. 2-5) The reference by Lear to 1974 is by no means clear regarding exactly what is being discussed. Taken in context, this reference was to an irregularity in the receipt of monthly payments as contemplated. (Tr. Vol. II within Vol. I (filed 4/15/85) P. 101, L. 14-22) However, the Defendant's own evidence refutes that recollection. (D's Exh. K-6) Consequently, the clear, convincing and uncontradicted evidence regarding the date when Lear actually knew she had been defrauded pinpoints said date within five years of the filing of this suit.

Even utilizing the "should have known" standard with respect to knowledge of this fraud yields the same result. Specifically, the Defendant's own evidence (K-6) clearly establishes regular payments to and within five years of the filing of this suit. Matters about which there can be no dispute need not be submitted to the jury. *Baker v. St. Paul Fire & Marine Ins. Co., Supra.*

WHEREFORE, Appellee prays for an order by this Court rehearing and correcting its judgment entered on August 8, 1986, and affirming the trial court's judgment on the jury's verdict in favor of Plaintiff.

Respectfully submitted,

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